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IN THE

Supreme Court of the United States

NO. 1229

OCTOBER TERM, 1965

JAMES R. McCARTHY, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

ANSWER AND BRIEF FOR RESPONDENT IN OPPOSITION

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ANSWER AND BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, the Commonwealth of Pennsylvania, by ROBERT W. DUGGAN, District Attorney of Allegheny County, Pennsylvania, and EDWIN J. MARTIN, Assistant District Attorney, makes answer to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania as follows:

OPINIONS BELOW

The ruling of the Superior Court of Pennsylvania is reported at *Commonwealth v. McCarthy,* 206 Pa. Super. Ct. 744, ... A 2d .... (1965), and as Petitioner's Appendix B.

The opinion of the state criminal trial courts are not reported but are set forth as Petitioner's Appendices C and D.

JURISDICTION

Jusisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the Petition is timely filed.

Whether a statute of the Commonwealth of Pennsylvania will be declared contrary to the Fourteenth Amendment to the Constitution when the issue has not been presented to the Courts of Pennsylvania.

Whether a statute of the Commonwealth of Pennsylvania is in violation of the Fourteenth Amendment to the Federal Constitution.

STATUTES AND CONSTITUTION INVOLVED

The pertinent provisions of the Pennsylvania Statutes and Pennsylvania Constitution of 1874 are not set forth in the Petition.

The pertinent provisions of the Act of 1911, April 27, P.L. 101, (Title 17, Purdon's Pa. Stats. Ann. Sec. 226, *et seq.*), and the Constitution of Pennsylvania, Article 5, Section 8 (Purdon's Pa. Stats. Ann., Constitution) are set forth in this answer at pp. 10, 11.

The pertinent provisions of the Federal Constitution and United States Code are set forth in the Petition.

COUNTER-STATEMENT

Petitioner was convicted in two separate criminal jury trials in the criminal courts of Allegheny County, Pennsylvania (Pittsburgh).

James R. McCarthy, Petitioner, was charged with the crime of false pretenses in two separate criminal indictments at No. 672 and 673 September Sessions, 1963 in the Court of Quarter Sessions of the Peace and General Jail Delivery of Allegheny County, Pennsylvania. Defendant was tried before the Honorable Alton A. McDonald, Judge, 47th Judicial District, Specially Presiding and a jury. The jury returned a verdict of guilty as to both indictments on April 15, 1964.

On May 13, 1964, James R. McCarthy and Arlene Knowles were tried in the same court on nineteen separate indictments at No. 513 through 531, April Sessions 1963 upon the charges of false pretenses, fraudulent conversion and conspiracy. The defendants were jointly charged with the crime of conspiracy to cheat and defraud at No. 513. At Nos. 514 through 522 inclusive, defendants were charged with the crime of false pretenses, and at Nos. 523 through 531 inclusive, defendants were charged with the crimes of fraudulent conversion. Trial was before the Honorable Lloyd L. Weaver, President Judge, 18th Judicial District, Specially Presiding and a jury. The trial judge sustained demurrers to four charges: Nos. 515, 520, 524 and 528. The jury returned a verdict of not guilty as to the charge of conspiracy at No. 513 April, 1963 and returned verdicts of guilty as to the other charges.

After each of the foregoing trials, the defendants filed the usual motions for new trial and motions in ar-

rest of judgment, wherein the sufficiency of the evidence was questioned. In addition, the motion for a new trial at Nos. 672 and 673 sets forth some factual allegations concerning the jury's deliberations and the conduct of the jury during the trial. However, these matters concerning the conduct of the jury were not pursued in accordance with the recognized procedures, and were not argued in the post-trial argument in the trial courts and were not presented to the appellate courts of Pennsylvania.

Post-trial motions were orally argued before a court *en banc* composed of the two criminal trial judges, both specially presiding. No briefs were presented to the trial court. Each trial judge wrote a separate Opinion in support of the refusal of post-trial motions (Petitioner's Appendices C and D).

In the post-trial motions for new trial and in arrest of judgment, petitioner asserted insufficiency of evidence upon which the juries could return verdicts of guilty (9, 12, 13, 14, 17).[1] The issues set forth in the present Petition were not presented to the court *en banc,* either by brief or orally.

Petitioner filed separate appeals to the Superior Court of Pennsylvania, in each of the two convictions. After continuances granted to petitioner, the appeals were orally argued on September 13, 1965. Typewritten briefs were submitted by petitioner in the Superior Court. The issues briefed and argued by petitioner in

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1. Numbers in parenthesis are references to page numbers in the printed appendices of the petitioner unless otherwise indicated.

the appellate court concerned the sufficiency of the evidence and the nature of evidence of the elements of the crime. The issues set forth in the present Petition were not presented to the Superior Court of Pennsylvania, either by brief or orally. On October 15, 1965, the convictions were affirmed without Opinion by the Superior Court (2).

A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on December 20, 1965. A Petition for Reconsideration was filed in the Supreme Court of Pennsylvania on December 30, 1965. The issue of constitutional rights was first presented in the aforesaid Petition for Reconsideration in the Supreme Court of Pennsylvania. On February 10, 1966 the Supreme Court of Pennsylvania refused to reconsider (1).

The date that this Petition was perfected is not known to the respondent.

Allegheny County constitutes the 5th Judicial District of Pennsylvania pursuant to Pennsylvania constitutional and statutory authority.[2] The judges who presided at the two trials of the petitioner were both elected to the bench of the Common Pleas Courts of other counties in the Commonwealth. They were assigned to specially preside in the Criminal Courts of Allegheny County pursuant to statutory authority as hereinafter set forth. The two trial judges constituted a court *en banc* before which the post-trial motions of the petitioner were orally argued.

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2. Pennsylvania Constitution of 1874, Article 5, Section 5. See also, Act of 1952, Jan. 8, P.L. (1951) 1844, No. 494, Sec. 1 (Title 17 Purdon's Pa. Stat. Ann. 784).

ARGUMENT

The petition is not timely filed within 90 days from the date of final adjudication in the Courts of Pennsylvania and the writ should be denied. The request for reconsideration addressed to the Supreme Court of Pennsylvania was not effective to toll the 90-day limitation.

Petitioner seeks to question the validity of a statute of the Commonwealth of Pennsylvania without having first properly raised the issue in the lower courts or the appellate courts of Pennsylvania.

The statute and Constitution of Pennsylvania are valid and are not offensive to the Federal Constitution. The petition does not set forth any valid reasons in support of the contention that petitioner has been denied due process of law.

The petition should be denied.

I. The Petition Is Not Timely Filed and Should Be Denied.

The respondent contends that the final judgment is the Order of the Supreme Court of Pennsylvania dated December 20, 1965, which refused petitioner's application for appeal from the Orders of the Superior Court of Pennsylvania. This being so, petitioner has failed to comply with the requirement that the Petition be filed within 90 days as required by the provisions of Rule 22 (1). Because of the above-mentioned failure, the Petition for Certiorari must be denied for want of jurisdiction. *Department of Banking v. Pink,* 317 U.S. 264 at 268 (1942).

Argument.

The issue is controlled by the holdings in cases such as *Department of Banking v. Pink,* supra, and *American Railway Express Company v. Levee,* 263 U.S. 19 (1923) and not by the holdings in cases such as *United States v. Healy,* 376 U.S. 75 (1964).

Under the law of Pennsylvania appeals from convictions in criminal cases, other than homicide, must be taken to the Superior Court. Act of 1895, June 24, P.L. 212, Section 7 as amended 1963, Aug. 14, P.L. 819, Section 1. (Title 17, Purdon's Pa. Stats, Ann., Section 182,—1965 Supplement; see also, Section 191.4,—1965 Supplement.)

The Supreme Court of Pennsylvania may allow an appeal from the Superior Court in criminal cases in accordance with statutory authority under the Act of 1895, June 24, P.L. 212, Section 7 (e) as amended 1963, August 14, P.L. 819, Section 1 (Title 17, Purdon's Pa. Stats. Ann., Section 190, and 1965 Supplement). The Supreme Court of Pennsylvania also has the statutory right to prescribe rules governing the practice and procedure in all appeals from any adjudication to the Supreme Court of Pennsylvania. Act of 1953, July 29, P.L. 1012 (Title 17, Purdon's Pa. Stats. Ann., Section 67). See also, Article 5, Sec. 2, Constitution (Purdon's Pa. Stat. Ann., Constitution).

Petitioner made application for the allowance of an appeal from the Superior Court to the Supreme Court of Pennsylvania in accordance with Section 7 (e) of the Act of 1895, supra, and in accordance with Rule 69 of the Supreme Court of Pennsylvania. The application for appeal was denied on December 20, 1965, without hearing or argument, on Petition and Answer. Thereafter, Petitioner requested reconsideration by the Supreme Court

of Pennsylvania and this was refused. Although Rule 71 of the Rules of the Supreme Court of Pennsylvania provides for the filing of a "Petition for Reargument", that rule is not applicable to the present matter. There is no express authority, either by rule or by statute, for reconsideration of the refusal of an appeal by the Supreme Court of Pennsylvania.

Even assuming, for the sake of argument, that the Supreme Court Pennsylvania could have allowed an appeal as a result of the application for reconsideration, the second application for appeal was not effective to toll the 90-day time for appeal. To hold otherwise, would permit applications for certiorari to the Supreme Court of the United States to be prolonged indefinitely by repeated applications to the highest appellate court of Pennsylvania by the same method.

The appellate rights of Petitioner were finally adjudicated by the Order of the Supreme Court of Pennsylvania rendered on December 20, 1965. This being so, the Petition was not timely filed and should be denied. *Cole v. Violette,* 319 U.S. 581 (1943); *Department of Banking v. Pink,* 317 U.S. 264 (1942). Because of the fact that there was no hearing originally granted by the Supreme Court of Pennsylvania, the circumstances are entirely different than are present when an application for a rehearing will toll the running of the 90-day appeal period.

II. The Petition Should Be Denied When It Seeks to Question the Constitutionality of a Statute of Pennsylvania Without Having Timely Raised the Issue in the State Courts.

There was no timely objection to the make-up of the court *en banc* which heard the post trial motions filed by petitioner. Failure of petitioner to make contemporaneous objection will preclude vindication of federal constitutional rights. *Henry v. Mississippi*, 379 U.S. 443 (1965). The issue was not presented to the Superior Court of Pennsylvania, which court had direct appellate jurisdiction in the present case. Thereafter, the issue was not presented to the Supreme Court of Pennsylvania in the original request for allowance of appeal. The matter set forth in the Petition was first raised by request for reconsideration addressed to the Supreme Court of Pennsylvania.

Contemporaneous objection is required by the courts of Pennsylvania.

Although not set forth in the Petition, this is an attack on a statute of Pennsylvania duly enacted by the Legislature of Pennsylvania. The Act of April 27, 1911, P.L. 101, as amended, provides that a law judge of any court of Common Pleas or Orphans' Court who can spare the time to sit in any other district may file a statement of his availability with the prothonotary of the Supreme Court of Pennsylvania: (Title 17, Purdon's, Pa. Stat. Ann., 226). Section 2 of the Act of 1911 provides a register of any available judges shall be maintained. Section 3 of the Act of 1911, as amended in 1933, sets forth that, upon assignment of a judge to specially preside in another judicial district, any judge so called

has "the same power and authority as vested in the judge or judges of said district . . ." (Title 17, Purdon's Pa. Stat. Ann. 228).[3]

Having failed to make timely objection to the constitutionality of the Act of 1911, the petitioner should be precluded from presenting the matter at this time. The Petition should be denied.

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3. "Any president judge of any such court where there is only one judge, or a majority of any such court where there is more than one judge, being of the opinion that it is necessary for the purpose of expediting the business of the said court, shall have the power to call upon any of said judges, so registered as aforesaid, by transmitting a written request to the prothonotary of the Supreme Court, who shall forthwith send such request to the judge so called upon. If no particular judge is designated in the call, then the prothonotary shall transmit the request to one of the judges who is registered upon the docket as having time to spare during the period named in said call. The judge who responds to any call under this section, and files with the prothonotary a certificate that his own work has been completed or that a substitute judge will not be required in his district because of his absence, shall thereupon be assigned to specially preside in the district from which the call has come, for the purpose of transacting the business thereof, with the same power and authority as vested in the judge or judges of said district: Provided, That no judge shall be assigned to any district while any judge thereof is assigned to and presiding in another district under the provisions of this act. 1911, April 27, P.L. 101, Section 3; 1933, June 1, P.L. 1139, No. 283, Section 1."

III. The Assignment of Judges in Pennsylvania Is Not Violative of the Constitution of the United States and Not Violative of the Constitution of Pennsylvania.

Respondent respectfully contends that the position of petitioner is devoid of merit and is frivolous. The Petition is devoid of merit because the statutory authority for the assignment of judges in Pennsylvania has been found to be valid by the decisions of the appellate courts of Pennsylvania. The Petition is frivolous because it is totally devoid of any valid reasons in support of the assertion there has been a "deprivation of liberty without due process of law".[4]

The appellate courts of Pennsylvania have interpreted the Act of 1911 and found the procedure for assignment of judges to be valid. In so doing, the decisions have interpreted the foregoing statutory authority in the light of the Constitution of Pennsylvania Article 5, Section 8. *Commonwealth v. Johnson,* 236 Pa. 412, 84 Atl. 824 (1912). *Commonwealth v. Graffius,* 67 Pa. Super. Ct. 281, (1917). The validity of the quoted statutory authority under the Federal Constitution has never been tested.

The fifth article of the Constitution of Pennsylvania deals particularly with courts and judges in the 26 sections contained therein. *Commonwealth ex rel. Margiotti v. Sutton,* 327 Pa. 337, 193 Atl. 250 (1937).

Section 8 of Article 5 of the Pennsylvania Constitution provides as follows:

"The said courts in the counties of Philadelphia and

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4. At page 8 of the Petition.

Allegheny, respectively, shall, from time to time, in turn detail one or more of their judges to hold the courts of oyer and terminer and the courts of quarter sessions of the peace of said counties in such manner as may be directed by law."

The case of *Commonwealth v. Johnson,* supra, determined that pursuant to the Act of 1911, supra, common pleas judges could specially preside at trials in the Counties of Allegheny and Philadelphia under the quoted section of the Pennsylvania Constitution.

It is obvious that if the judges who specially preside in the criminal courts of Allegheny County, Pennsylvania have the same powers as the elected law judges of that county, then they have the power to sit as a court *en banc* to hear post-trial motions and dispose of the same. Those decisions which interpret the duties and powers of judges sitting on the equity side of the court are not applicable to the problem here raised.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT W. DUGGAN
District Attorney of
Allegheny County

EDWIN J. MARTIN
Assistant District Attorney

May 16, 1966